July 2005

MJI Publication Updates

Crime Victim Rights Manual (Revised Edition)

Criminal Procedure Monograph 3—Misdemeanor Arraignments & Pleas (Revised Edition)

Criminal Procedure Monograph 5—Preliminary Examinations (Revised Edition)

Criminal Procedure Monograph 6—Pretrial Motions (Revised Edition)

Criminal Procedure Monograph 7—Probation Revocation (Revised Edition)

Juvenile Justice Benchbook (Revised Edition)

Managing a Trial Under the Controlled Substances Act

Michigan Circuit Court Benchbook

Sexual Assault Benchbook

July 2005

Update: Crime Victim Rights Manual (Revised Edition)

CHAPTER 8

The Crime Victim at Trial

8.14 Former Testimony of Unavailable Witness

C. Defendant's Right to Confront the Witnesses Against Him or Her

Insert the following text after the June 2005 update to page 264:

In *United States v Arnold*, ___ F3d ___ (CA 6, 2005), the Sixth Circuit expounded on the Supreme Court's discussion of testimonial evidence in *Crawford v Washington*, 541 US 36, 50–62 (2004), by examining the dictionary definitions of the terms "testimony" and "testimonial." In *Arnold*, the court noted that "[t]he Oxford English Dictionary ('OED') defines 'testimonial' as 'serving as evidence; conducive to proof;' as 'verbal or documentary evidence;' and as '[s]omething serving as proof or evidence.' . . . The OED defines 'testimony' as '[p]ersonal or documentary evidence or attestation in support of a fact or statement; hence, *any form of evidence or proof*.' . . . (emphasis added)." The Court further noted that Webster's Third New International Dictionary of the English Language "defines 'testimonial' as 'something that serves as evidence: proof.'" The dictionary definitions, coupled with *Crawford's* standard that statements made to government officers– including police—are testimonial in nature and should not be admitted when a defendant has not had the opportunity to cross-examine the declarant, compelled the *Arnold* Court to conclude that the out-of-court statements were improperly admitted against the defendant at trial.

CHAPTER 10

Restitution

10.6 Persons or Entities Entitled to Restitution

A. Any Victim of the Course of Conduct That Gave Rise to the Conviction or Adjudication

On page 320, add the following text after the second full paragraph:

MCL 712A.30(1)(b) states in part:

> "For purposes of subsections (2), (3), (6), (8), (9), and (13), victim includes a sole proprietorship, partnership, corporation, association, governmental entity, or other legal entity that suffers direct physical or financial harm as a result of a juvenile offense."

MCL 780.794(1)(b) contains substantially similar language.

*For more information on ordering a parent to pay restitution, see Section 10.13.

In *In re McEvoy*, ___ Mich App ___, ___ (2005), the trial court ordered the juvenile and his parents to pay restitution to a school district's insurer.* On appeal, the juvenile's parents argued "that pursuant to the definition of 'victim' in MCL 712A.30(1)(b), the school district is a victim for purposes of only 'subsections (2), (3), (6), (8), (9), and (13)' and therefore parents may not be required to pay restitution under subsection (15) to a 'non-individual' victim." The Court of Appeals rejected this argument, stating:

> "Foremost in negating appellants' logic is the fact that the word victim does not appear in subsection (15), and therefore there is no need to define the term for purposes of that subsection. Further, the key language in the definition of the term 'victim' is identical in both the juvenile code and the CVRA[.] . . . Subsection (2) is the key substantive provision providing for restitution and that subsection expressly states that the court shall order that the juvenile 'make full restitution to any victim,' which by definition includes a legal entity such as the school district." [Citations and footnotes omitted.] *McEvoy, supra* at ___.

More importantly, a review of the restitution provisions in both the Juvenile Code and CVRA reveal that the subsections not applicable to the definition of "non-individual" victims have no logical application to legal entities (e.g., restitution for physical or psychological injuries or death) or are primarily procedural.

10.6 Persons or Entities Entitled to Restitution

B. Individuals or Entities That Have Compensated the Victim

On page 324, insert the following text immediately before subsection (C):

In *In re McEvoy*, ___ Mich App ___ (2005), the trial court ordered a juvenile's parents to pay restitution to a school district's insurer for damage caused by the juvenile setting fire to a high school. The restitution amount was based on the amount the insurer paid to the insured under the insurance policy—the replacement value of the damaged property. The Court of Appeals vacated the restitution order and remanded for redetermination of the amount of loss actually suffered by the school district. *Id.* at ___. The Court construed MCL 712A.30(8), which, like MCL 780.794(8), requires a court to order restitution to a legal entity that has compensated a direct victim "for a loss incurred by the [direct] victim to the extent of the compensation paid for that loss." The Court stated that under MCL 712A.30(8), "an entity that compensated a victim 'for a loss incurred by the victim' is entitled to receive restitution 'to the extent of the compensation paid for *that* loss,' clearly meaning the loss of the victim, not the loss of the compensating entity." *McEvoy, supra* at ___. The Court noted that the statutory provisions for calculating restitution for property damage or destruction use the value of the property damaged or destroyed—the victim's actual loss—as the basis for a restitution order. The Court stated:

> "Under the circumstances of the case, the loss of the compensating entity is based on the commercial transaction involved, i.e., the school district's purchase of replacement coverage insurance, rather than the loss resulting from the fire, which underscores that the result is incongruent with the purpose of the statute. Although the amount of restitution is within the discretion of the trial court, the court erred to the extent it ordered restitution to SET-SEG on the basis of the amount SET-SEG compensated the school district, rather than the amount of the actual loss sustained by the school. Restitution must be based on the value of the property damaged, i.e., the victim's actual loss." *Id.*

10.9 Calculating Restitution Where the Offense Results in Property Damage, Destruction, Loss, or Seizure

Insert the following text at the bottom of page 327:

In *In re McEvoy*, ___ Mich App ___ (2005), the trial court ordered a juvenile's parents to pay restitution to a school district's insurer for damage caused by the juvenile setting fire to a high school. The restitution amount was based on the amount the insurer paid to the insured under the insurance policy—the replacement value of the damaged property. The Court of Appeals vacated the restitution order and remanded for redetermination of the amount of loss actually suffered by the school district. *Id.* at ___. The Court construed MCL 712A.30(8), which, like MCL 780.794(8), requires a court to order restitution to a legal entity that has compensated a direct victim "for a loss incurred by the [direct] victim to the extent of the compensation paid for that loss." The Court stated that under MCL 712A.30(8), "an entity that compensated a victim 'for a loss incurred by the victim' is entitled to receive restitution 'to the extent of the compensation paid for *that* loss,' clearly meaning the loss of the victim, not the loss of the compensating entity." *McEvoy, supra* at ___. The Court noted that the statutory provisions for calculating restitution for property damage or destruction use the value of the property damaged or destroyed—the victim's actual loss—as the basis for a restitution order. The Court stated:

> "Under the circumstances of the case, the loss of the compensating entity is based on the commercial transaction involved, i.e., the school district's purchase of replacement coverage insurance, rather than the loss resulting from the fire, which underscores that the result is incongruent with the purpose of the statute. Although the amount of restitution is within the discretion of the trial court, the court erred to the extent it ordered restitution to SET-SEG on the basis of the amount SET-SEG compensated the school district, rather than the amount of the actual loss sustained by the school. Restitution must be based on the value of the property damaged, i.e., the victim's actual loss." *Id.*

10.13 Hearings on Restitution Payable by Parents of Juvenile Offenders

On page 335, insert the following text immediately before Section 10.14:

The Juvenile Code does not limit the amount of restitution for which a supervisory parent may be held liable. *In re McEvoy*, ___ Mich App ___, ___ (2005). In *McEvoy*, a juvenile pled guilty to arson of real property and malicious destruction of personal property for setting fire to a high school. The trial court ordered the juvenile and his supervising parents to pay restitution but limited the parents' liability to their insurance proceeds. The juvenile's parents appealed the order, arguing that the Parental Liability Act, MCL 600.2913,* when read along with MCL 712A.30, limits a parent's liability to $2,500.00 in civil court actions. The Court of Appeals rejected the parents' argument, indicating that the Juvenile Code previously contained limits on a parent's liability, and the Legislature removed those limits. Furthermore, MCL 712A.30(9) provides that the amount of restitution paid to a victim must be set off against any compensatory damages recovered in a civil proceeding, clearly recognizing that restitution is independent of any damages sought in a civil proceeding.

*See Section 12.2 for a brief discussion of MCL 600.2913.

In *McEvoy*, the parents also argued that because MCL 712A.30(15) allows the court to impose unlimited restitution without a showing of fault on the part of the supervisory parent, it unconstitutionally deprives the parents of substantive due process. Applying a "rational basis" standard of review, the Court of Appeals disagreed. The Court first noted that although the Juvenile Code does not contain a limit on the amount a parent may be ordered to pay, it does limit imposition of liability to a parent having supervisory responsibility of the juvenile at the time of the criminal acts. In addition, a court must consider a parent's ability to pay and may cancel all or part of the parent's obligation if payment will impose a manifest hardship. Thus, parental liability may not be imposed solely based on a familial relationship.

> "The Legislature has clearly sought to link *liability* with *responsibility* in a reasonable, but purposeful manner, rather than burdening society generally or the victim, in particular, for the costs of a juvenile's illegal acts. The statute reasonably imposes liability on the parent responsible for supervising the child." *McEvoy, supra* at ___.

The Court concluded that the provisions for restitution by a supervisory parent bear a reasonable relationship to a permissible legislative objective; therefore, there is no violation of the parents' due process rights.

The parents also argued "that MCL 712A.30 is an unconstitutional bill of attainder because it punishes parents for their status, not their conduct." *McEvoy, supra* at ___. A bill of attainder is a "legislative act that determines guilt and inflicts punishment upon an identifiable group of individuals without the protections of a judicial trial." *Id.* In order to determine whether the statute

acts as a bill of attainder, the court must determine if the statute "inflicts forbidden punishment." The Court of Appeals determined that the restitution provisions of MCL 712A.30 "do not fall within the historical meaning of legislative punishment and are not validly characterized as punishment in the constitutional sense." *McEvoy, supra* at ___. The restitution provisions were designed to serve a nonpunitive purpose: to enable victims to be fairly compensated for losses. The Court also noted that MCL 712A.30(16) and (17) are specific provisions to mitigate any undue financial burden imposed upon parents. The Court concluded that given the nonpunitive nature of the sanctions and the statute's purpose and effect, it does not act as a bill of attainder.

July 2005

Update: Criminal Procedure Monograph 3—Misdemeanor Arraignments & Pleas (Revised Edition)

Part A—Commentary on Misdemeanor Arraignments

3.12 Waiver of the Right to Counsel

Insert the following text after the August 2004 update to pages 20–21:

Where the defendant never expressly stated that he wished to represent himself, the trial court denied the defendant's request for substitute counsel or the opportunity to retain counsel, the defendant represented himself with standby counsel at important pretrial hearings and during jury voir dire, and the defendant did not expressly waive his right to counsel until immediately before trial, the defendant was effectively denied counsel at critical stages of the criminal proceedings against him, and his conviction was reversed. *People v Willing*, ___ Mich App ___, ___ (2005).

Part B—Commentary on Pleas

3.40 Appealing a Plea-Based Conviction

Insert the following text before the January 2005 update to page 68:

In *Halbert v Michigan*, 545 US ___ (2005), the United States Supreme Court concluded that an indigent defendant convicted by plea may not be denied the appointment of appellate counsel to seek a discretionary appeal of his or her conviction. *Halbert* overrules the Michigan Supreme Court's decisions in *People v Harris*, 470 Mich 882 (2004) and *People v Bulger*, 462 Mich 495 (2000), and it nullifies MCL 770.3a, the statutory provision that addresses the appointment of counsel to indigent defendants convicted by plea.

Specifically, the *Halbert* Court held "that the Due Process and Equal Protection Clauses require the appointment of counsel for defendants, convicted on their pleas, who seek access to first-tier review in the Michigan Court of Appeals." *Halbert, supra* at ___. The *Halbert* Court examined Michigan's appellate court system and noted that an appeal to the Michigan Court of Appeals, whether by right or by leave, is a defendant's first-tier appeal and that, to some degree, the Court of Appeals' disposition of these appeals involves a determination of the appeals' merit. The *Halbert* Court noted that "indigent defendants pursuing first-tier review in the Court of Appeals are generally ill-equipped to represent themselves," a critical fact considering that the Court of Appeals' decision on those defendants' applications for leave to appeal may entail an adjudication of the merits of the appeal. Said the Court:

> "Whether formally categorized as the decision of an appeal or the disposal of a leave application, the Court of Appeals' ruling on a plea-convicted defendant's claims provides the first, and likely the only, direct review the defendant's conviction and sentence will receive." *Halbert, supra* at ___.

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Update: Criminal Procedure Monograph 5—Preliminary Examinations (Revised Edition)

Part A—Commentary

5.13 Waiver of Right to Counsel

Insert the following text after the August 2004 update to page 19:

Where the defendant never expressly stated that he wished to represent himself, the trial court denied the defendant's request for substitute counsel or the opportunity to retain counsel, the defendant represented himself with standby counsel at important pretrial hearings and during jury voir dire, and the defendant did not expressly waive his right to counsel until immediately before trial, the defendant was effectively denied counsel at critical stages of the criminal proceedings against him, and his conviction was reversed. *People v Willing*, ___ Mich App ___, ___ (2005).

July 2005

Update: Criminal Procedure Monograph 6—Pretrial Motions (Revised Edition)

Part 2—Individual Motions

6.18 Motion to Suppress Confession Because of a *Miranda* Violation

3. Invocation of *Miranda* Rights

Insert the following text after the first paragraph on page 33:

A defendant's ambiguous or equivocal reference to speaking with an attorney does not constitute an invocation of the defendant's right to counsel and does not require that police cease questioning the defendant. *People v Tierney*, ___ Mich App ___, ___ (2005). The standard for determining whether a defendant invoked his or her right to counsel was detailed by the United States Supreme Court in *Davis v United States,* 512 US 452 (1994). In *Davis*, the Court declared that a defendant's invocation of his or her right to counsel during custodial interrogation must be unequivocal. The *Davis* defendant's statement, "Maybe I should talk to a lawyer," was not unequivocal and did not amount to an invocation of the right to counsel.

In *Tierney*, the defendant mentioned an attorney twice during questioning. On both occasions, the defendant's statements "[we]re almost identical to the statement made by the defendant in *Davis*." *Tierney*, *supra* at ___. On one occasion, the defendant in *Tierney* said, "Maybe I should talk to an attorney." On another occasion the defendant said, "I might want to talk to an attorney." *Id*. Police did not violate the defendant's rights during questioning because the defendant's statements were not unequivocal and did not properly invoke his right to counsel. *Id*.

Part 2—Individual Motions

6.18 Motion to Suppress Confession Because of a *Miranda* Violation

6. The Requirements for a Valid Waiver of *Miranda* Rights

Insert the following text after the April 2004 update to page 36:

A defendant who is intoxicated and claims to be suicidal may make a valid waiver of his or her *Miranda* rights as long as the totality of the circumstances supports a finding that the waiver was voluntary and that it was made knowingly and intelligently. *People v Tierney*, ___ Mich App ___, ___ (2005).

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Part 2—Individual Motions

6.28 Motion to Suppress the Fruits of Illegal Police Conduct

Insert the following text at the top of page 66:

Evidence obtained after police officers made a warrantless entry into a home through an unlocked enclosed porch need not have been suppressed because the officers' conduct did not violate the defendant's constitutional right against unreasonable search and seizure. *People v Tierney*, ___ Mich App ___, ___ (2005).

In *Tierney*, when police officers arrived at the defendant's parents' residence, they noted that the defendant's truck was parked in the driveway, a light was on in the house, and loud music was coming from inside the home. *Tierney, supra* at ___. One officer knocked on the door to the home's enclosed porch, and after receiving no response, the officer opened the unlocked porch door and walked to the home's front door. According to the officer, and confirmed by testimony at trial, the porch appeared to be used as a storage area, not a living area. Defense witnesses testified that although the outer porch door was not equipped with a doorbell or knocker, the enclosed porch was a private space, and visitors (even friends and family members) were expected to knock at the porch door and remain outside the porch until they were invited in.

Primarily because the enclosed porch was not part of the home's living area, the trial court concluded that the defendant did not have an objectively reasonable expectation of privacy in the area. Further, because the officers' conduct was not unreasonable under the circumstances, evidence obtained as a result of their entry of the porch was properly admissible against the defendant. The Court of Appeals stated:

> "[W]e conclude, as did the trial court, that defendant did not have a reasonable expectation of privacy in the enclosed porch of his parents' home. While the curtains evidence some attempt to protect the area from observation, the porch seems to have served as an entryway into the house. There was no doorbell located on the exterior door (which was a screen door), while there was one on the interior door. Also, the 'welcome' sign was located adjacent to the interior door. For the most part, the porch did not have the characteristics of a living area. Rather, it was an unheated area used primarily as storage space. . . . . There was no intention or attempt to search the porch or its contents. Instead, the police merely attempted to gain the attention of the occupant of the house, who presumably because of the loud music, could not hear a knock on the porch door. The police actions were

> reasonable, did not violate a reasonable expectation of privacy, and did not violate the Fourth Amendment." *Tierney, supra* at ___.

After entering the enclosed porch, the officers saw through a window in the door that the defendant was slumped over the kitchen table near a rifle and ammunition. *Tierney, supra* at ___. The officers opened the door and continued through the home to the kitchen where the defendant and the weapon were secured. The prosecutor argued that warrantless entry of the home was justified by the emergency aid exception to the warrant requirement. This exception to the warrant requirement requires that police officers have a reasonable belief, supported by specific and articulable facts, that an individual inside the dwelling needs immediate assistance.

According to the *Tierney* Court, the warrantless entry was justified by the exception:

> "[T]he unrefuted testimony of [the officer] was that, as he prepared to knock on the inner door leading to the kitchen, he observed a motionless person sitting at the kitchen table, slumped over with his head resting on the table, his right hand on the table with a rifle lying a few centimeters from his right hand. [The officer] also observed a box of bullets on the table, and believed that defendant may have shot himself and might be injured. Accordingly, under the circumstances presented when the troopers entered the porch, the emergency aid exception to the warrant requirement applied, and the trial court correctly concluded that the officers lawfully entered into the kitchen of defendant's parents' home." *Tierney*, *supra* at ___.

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Update: Criminal Procedure Monograph 7—Probation Revocation (Revised Edition)

Part A—Commentary

7.29 Alternatives Following a Finding of Probation Violation

Delete the first sentence of the first full paragraph on page 27 and replace the second full paragraph on page 27 with the following case summary:

The legislative sentencing guidelines apply to a defendant's sentence of imprisonment following probation revocation when the offense for which the defendant was sentenced to probation was committed on or after January 1, 1999. *People v Hendrick*, ___ Mich ___, ___ (2005); MCL 769.34(2).

When a sentence is imposed following the imposition and revocation of probation for a conviction subject to the guidelines, MCL 771.4 authorizes the sentencing court to sentence the defendant to the same penalty that could have been imposed if probation had not been granted; that is, MCL 771.4 permits the court to sentence a defendant according to the guidelines recommendation as calculated for the defendant's sentencing offense at the time of the defendant's initial sentencing. *Hendrick, supra* at ___. The Michigan Supreme Court emphasized that MCL 771.4 does not require that a sentencing court be limited to imposing only a sentence that could have been imposed immediately after the defendant's conviction. A sentence imposed pursuant to MCL 771.4

> "is clearly permissive, not mandatory. It states that 'if' probation is revoked, the court 'may' sentence the defendant as if probation had never been granted. While the sentencing court *may* sentence the probationer in the same manner and to the same penalty, nothing in the statute requires it to do so." *Hendrick, supra* at ___.

*The Court of Appeals wrongly indicated that the conduct considered by the trial court was included in scoring the defendant's OVs and PRVs.

The *Hendrick* Court affirmed in part* the Court of Appeals decision in *People v Hendrick*, 261 Mich App 673 (2004). Said the Court:

> "The Court of Appeals correctly held that the sentencing guidelines apply to sentences imposed after a probation violation and that acts giving rise to the probation violation may constitute substantial and compelling reasons to depart from the guidelines.
>
> * * *
>
> "Without a mandate to impose a sentence on the probationer in the same manner and to the same penalty that could have been imposed if the probation order had never been made, it is perfectly acceptable to consider postprobation factors in determining whether substantial and compelling reasons exist to warrant an upward departure from the legislative sentencing guidelines." *Hendrick, supra* at ___. (Footnotes omitted.)

An individual's probation violation alone—without regard to the specific conduct underlying the violation—may constitute a substantial and compelling reason to depart from the sentencing guidelines. *People v Schaafsma*, ___ Mich App ___, ___ (2005). According to the *Schaafsma* Court:

> "[A]ny probation violation represents an affront to the court and an indication of an offender's callous attitude toward correction and toward the trust the court has granted the probationer. The violation itself is objective and verifiable, so we see no reason why a court must focus exclusively on the underlying conduct, especially since the conduct itself may be punished in a separate proceeding. We conclude that the offender's probation violation itself is an objective and verifiable factor worthy of independent consideration. Since the probation violation is objective and verifiable, in its discretion the trial court may conclude that the factor provides a substantial and compelling reason to depart from the sentencing guidelines." *Schaafsma, supra* at ___.

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July 2005

Update: Juvenile Justice Benchbook (Revised Edition)

CHAPTER 10

Juvenile Dispositions

10.12 Restitution

E. Persons or Entities Entitled to Restitution

On page 238, add the following text to the end of the first paragraph:

MCL 712A.30(1)(b) states in part:

> "For purposes of subsections (2), (3), (6), (8), (9), and (13), victim includes a sole proprietorship, partnership, corporation, association, governmental entity, or other legal entity that suffers direct physical or financial harm as a result of a juvenile offense."

MCL 780.794(1)(b) contains substantially similar language.

In *In re McEvoy*, ___ Mich App ___, ___ (2005), the trial court ordered the juvenile and his parents to pay restitution to a school district's insurer.* On appeal, the juvenile's parents argued "that pursuant to the definition of 'victim' in MCL 712A.30(1)(b), the school district is a victim for purposes of only 'subsections (2), (3), (6), (8), (9), and (13)' and therefore parents may not be required to pay restitution under subsection (15) to a 'non-individual' victim." The Court of Appeals rejected this argument, stating:

> "Foremost in negating appellants' logic is the fact that the word victim does not appear in subsection (15), and therefore there is no need to define the term for purposes of that subsection. Further, the key language in the definition of the term 'victim' is identical in both the juvenile code and the CVRA[.] . . . Subsection (2) is the key substantive provision providing for restitution and that subsection expressly states that the court shall order that the juvenile 'make full restitution to any victim,' which by definition includes a legal entity such as the school district." [Citations and footnotes omitted.] *McEvoy, supra* at ___.

*For more information on ordering a parent to pay restitution, see Section 10.12(L).

More importantly, a review of the restitution provisions in both the Juvenile Code and CVRA reveal that the subsections not applicable to the definition of "non-individual" victims have no logical application to legal entities (e.g., restitution for physical or psychological injuries or death) or are primarily procedural.

Insert the following text before the April 2005 update to page 239:

In *In re McEvoy*, ___ Mich App ___ (2005), the trial court ordered a juvenile's parents to pay restitution to a school district's insurer for damage caused by the juvenile setting fire to a high school. The restitution amount was based on the amount the insurer paid to the insured under the insurance policy—the replacement value of the damaged property. The Court of Appeals vacated the restitution order and remanded for redetermination of the amount of loss actually suffered by the school district. *Id.* at ___. The Court construed MCL 712A.30(8), which, like MCL 780.794(8), requires a court to order restitution to a legal entity that has compensated a direct victim "for a loss incurred by the [direct] victim to the extent of the compensation paid for that loss." The Court stated that under MCL 712A.30(8), "an entity that compensated a victim 'for a loss incurred by the victim' is entitled to receive restitution 'to the extent of the compensation paid for *that* loss,' clearly meaning the loss of the victim, not the loss of the compensating entity." *McEvoy, supra* at ___. The Court noted that the statutory provisions for calculating restitution for property damage or destruction use the value of the property damaged or destroyed—the victim's actual loss—as the basis for a restitution order. The Court stated:

> "Under the circumstances of the case, the loss of the compensating entity is based on the commercial transaction involved, i.e., the school district's purchase of replacement coverage insurance, rather than the loss resulting from the fire, which underscores that the result is incongruent with the purpose of the statute. Although the amount of restitution is within the discretion of the trial court, the court erred to the extent it ordered restitution to SET-SEG on the basis of the amount SET-SEG compensated the school district, rather than the amount of the actual loss sustained by the school. Restitution must be based on the value of the property damaged, i.e., the victim's actual loss." *Id.*

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CHAPTER 10
Juvenile Dispositions

10.12 Restitution

L. Hearings on Restitution Payable by Juvenile's Parent

On page 246 after the third paragraph, insert the following text:

The Juvenile Code does not limit the amount of restitution for which a supervisory parent may be held liable. *In re McEvoy*, ___ Mich App ___, ___ (2005). In *McEvoy*, a juvenile pled guilty to arson of real property and malicious destruction of personal property for setting fire to a high school. The trial court ordered the juvenile and his supervising parents to pay restitution but limited the parents' liability to their insurance proceeds. The juvenile's parents appealed the order, arguing that the Parental Liability Act, MCL 600.2913,* when read along with MCL 712A.30, limits a parent's liability to $2,500.00 in civil court actions. The Court of Appeals rejected the parents' argument, indicating that the Juvenile Code previously contained limits on a parent's liability, and the Legislature removed those limits. Furthermore, MCL 712A.30(9) provides that the amount of restitution paid to a victim must be set off against any compensatory damages recovered in a civil proceeding, clearly recognizing that restitution is independent of any damages sought in a civil proceeding.

*See Section 25.4 for a brief discussion of MCL 600.2913.

In *McEvoy*, the parents also argued that because MCL 712A.30(15) allows the court to impose unlimited restitution without a showing of fault on the part of the supervisory parent, it unconstitutionally deprives the parents of substantive due process. Applying a "rational basis" standard of review, the Court of Appeals disagreed. The Court first noted that although the Juvenile Code does not contain a limit on the amount a parent may be ordered to pay, it does limit imposition of liability to a parent having supervisory responsibility of the juvenile at the time of the criminal acts. In addition, a court must consider a parent's ability to pay and may cancel all or part of the parent's obligation if payment will impose a manifest hardship. Thus, parental liability may not be imposed solely based on a familial relationship.

> "The Legislature has clearly sought to link *liability* with *responsibility* in a reasonable, but purposeful manner, rather than burdening society generally or the victim, in particular, for the costs of a juvenile's illegal acts. The statute reasonably imposes liability on the parent responsible for supervising the child." *McEvoy, supra* at ___.

The Court concluded that the provisions for restitution by a supervisory parent bear a reasonable relationship to a permissible legislative objective; therefore, there is no violation of the parents' due process rights.

The parents also argued "that MCL 712A.30 is an unconstitutional bill of attainder because it punishes parents for their status, not their conduct." *McEvoy, supra* at ___. A bill of attainder is a "legislative act that determines guilt and inflicts punishment upon an identifiable group of individuals without the protections of a judicial trial." *Id.* In order to determine whether the statute acts as a bill of attainder, the court must determine if the statute "inflicts forbidden punishment." The Court of Appeals determined that the restitution provisions of MCL 712A.30 "do not fall within the historical meaning of legislative punishment and are not validly characterized as punishment in the constitutional sense." *McEvoy, supra* at ___. The restitution provisions were designed to serve a nonpunitive purpose: to enable victims to be fairly compensated for losses. The Court also noted that MCL 712A.30(16) and (17) are specific provisions to mitigate any undue financial burden imposed upon parents. The Court concluded that given the nonpunitive nature of the sanctions and the statute's purpose and effect, it does not act as a bill of attainder.

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CHAPTER 24

Appeals

24.10 Appointment of Appellate Counsel

Insert the following text before the January 2005 update to page 486:

In *Halbert v Michigan*, 545 US ___ (2005), the United States Supreme Court concluded that an indigent defendant convicted by plea may not be denied the appointment of appellate counsel to seek a discretionary appeal of his or her conviction. *Halbert* overrules the Michigan Supreme Court's decisions in *People v Harris*, 470 Mich 882 (2004) and *People v Bulger*, 462 Mich 495 (2000), and it nullifies MCL 770.3a, the statutory provision that addresses the appointment of counsel to indigent defendants convicted by plea.

Specifically, the *Halbert* Court held "that the Due Process and Equal Protection Clauses require the appointment of counsel for defendants, convicted on their pleas, who seek access to first-tier review in the Michigan Court of Appeals." *Halbert, supra* at ___. The *Halbert* Court examined Michigan's appellate court system and noted that an appeal to the Michigan Court of Appeals, whether by right or by leave, is a defendant's first-tier appeal and that, to some degree, the Court of Appeals' disposition of these appeals involves a determination of the appeals' merit. The *Halbert* Court noted that "indigent defendants pursuing first-tier review in the Court of Appeals are generally ill-equipped to represent themselves," a critical fact considering that the Court of Appeals' decision on those defendants' applications for leave to appeal may entail an adjudication of the merits of the appeal. Said the Court:

> "Whether formally categorized as the decision of an appeal or the disposal of a leave application, the Court of Appeals' ruling on a plea-convicted defendant's claims provides the first, and likely the only, direct review the defendant's conviction and sentence will receive." *Halbert, supra* at ___.

July 2005

Update: Managing a Trial Under The Controlled Substances Act

CHAPTER 5

Other Offenses Under the Controlled Substances Act

5.7 Offenses Involving Drug Paraphernalia

A. Definition of Paraphernalia

Add the following bulleted text on the bottom of page 127 before sub-subsection (B):

- MCL 333.7457(d) exempts "[e]quipment, a product, or material which may be used in the preparation or smoking of tobacco or smoking herbs other than a controlled substance" from the general prohibition against the sale of drug paraphernalia. Although such items as pipes, bongs, and "dug-outs" are specifically designed to introduce a controlled substance into the body, these items are exempt from the definition of "drug paraphernalia" because they *may be* used to smoke tobacco and other non-controlled substances. *Gauthier v Alpena County Pros*, ___ Mich App ___, ___ (2005).

CHAPTER 15

Sentencing

15.6 "Substantial and Compelling Reasons" to Depart from Minimum Prison Terms

B. Michigan Supreme Court's Definition of "Substantial and Compelling"

2. Post-Arrest Factors Are Not Disfavored

Insert the following text on the bottom of page 340:

A trial court may properly consider an individual's postprobation conduct when imposing a sentence of imprisonment following revocation of the individual's probation. *People v Hendrick*, ___ Mich ___, ___ (2005). A court may look to an individual's postprobation conduct to determine whether substantial and compelling reasons warrant a departure from the minimum sentence range recommended under the legislative guidelines. *Hendrick, supra* at ___.

An individual's probation violation alone—without regard to the specific conduct underlying the violation—may constitute a substantial and compelling reason to depart from the sentencing guidelines. *People v Schaafsma*, ___ Mich App ___, ___ (2005). According to the *Schaafsma* Court:

> "[A]ny probation violation represents an affront to the court and an indication of an offender's callous attitude toward correction and toward the trust the court has granted the probationer. The violation itself is objective and verifiable, so we see no reason why a court must focus exclusively on the underlying conduct, especially since the conduct itself may be punished in a separate proceeding. We conclude that the offender's probation violation itself is an objective and verifiable factor worthy of independent consideration. Since the probation violation is objective and verifiable, in its discretion the trial court may conclude that the factor provides a substantial and compelling reason to depart from the sentencing guidelines." *Schaafsma, supra* at ___.

July 2005

Update: Michigan Circuit Court Benchbook

CHAPTER 4

Criminal Proceedings

Part I—Preliminary Proceedings (MCR Subchapters 6.000 and 6.100)

4.5 Attorneys—Waiver of Counsel

A. Right of Self-Representation

Insert the following text on page 283 before the last paragraph in this subsection:

Where the defendant never expressly stated that he wished to represent himself, the trial court denied the defendant's request for substitute counsel or the opportunity to retain counsel, the defendant represented himself with standby counsel at important pretrial hearings and during jury voir dire, and the defendant did not expressly waive his right to counsel until immediately before trial, the defendant was effectively denied counsel at critical stages of the criminal proceedings against him, and his conviction was reversed. *People v Willing*, ___ Mich App ___, ___ (2005).

CHAPTER 4

Criminal Proceedings

Part II—Pretrial Motions and Proceedings (MCR Subchapters 6.000 and 6.100)

4.11 Motion to Suppress Defendant's Statement

C. Evidentiary (*"Walker"*) Hearing

1. Voluntary, Knowing, and Intelligent Confession

Insert the following text after the first full paragraph near the top of page 301:

A defendant may make a voluntary, knowing, and intelligent waiver of his or her right against self-incrimination, even when the defendant was intoxicated and suicidal at the time of the confession. *People v Tierney*, ___ Mich App ___, ___ (2005). The *Tierney* Court affirmed the trial court's analysis of the *Cipriano* factors and emphasized that a defendant's intoxication was only one of the eleven *Cipriano* factors. The Court noted that any effect that the defendant's intoxication may have had on the defendant was significantly outweighed by other factors, including the defendant's college education, his experience with the criminal justice system, the absence of any threats, and the fact that necessities (medical care, for example) were not withheld from the defendant during police questioning.

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CHAPTER 4

Criminal Proceedings

Part II—Pretrial Motions and Proceedings (MCR Subchapters 6.000 and 6.100)

4.11 Motion to Suppress Defendant's Statement

C. Evidentiary (*"Walker"*) Hearing

5. Waiver of *Miranda* Rights

Insert the following text after the second paragraph on page 305:

A defendant who is intoxicated and claims to be suicidal may make a valid waiver of his or her *Miranda* rights as long as the totality of circumstances supports a finding that the waiver was voluntary, and that it was made knowingly and intelligently. *People v Tierney*, ___ Mich App ___, ___ (2005). In *Tierney*, the defendant's college education and familiarity with the criminal justice system, coupled with the evidence that the defendant conducted himself in a coherent and rational manner during police questioning, supported the trial court's conclusion that the defendant's confession was voluntary and properly admitted at trial.

CHAPTER 4

Criminal Proceedings

Part II—Pretrial Motions and Proceedings (MCR Subchapters 6.000 and 6.100)

4.21 Search and Seizure Issues

E. Was a Warrant Required?

1. "Exigent Circumstances," "Emergency Doctrine," or "Hot Pursuit"

Insert the following text after the second full paragraph on page 340:

The emergency aid exception justified the warrantless entry of the defendant's parents' home, where officers, looking through a window in the front door to the house, saw a motionless person slumped over the kitchen table in close proximity to a rifle and ammunition. *People v Tierney*, ___ Mich App ___, ___ (2005). Based on these specific and articulable facts, officers had a reasonable belief that the person slumped over the table may have needed emergency medical assistance.

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CHAPTER 4

Criminal Proceedings

Part II—Pretrial Motions and Proceedings (MCR Subchapters 6.000 and 6.100)

4.23 Dwelling Searches

A. Generally

Insert the following text before subsection (B) near the bottom of page 352:

Depending on the circumstances, an individual may not have a reasonable expectation of privacy in an enclosed porch through which a person must pass in order to get to the dwelling's front door. *People v Tierney*, ___ Mich App ___ (2005). In *Tierney*, the trial court conducted a fact-intensive inquiry and determined that the defendant did not have a reasonable expectation of privacy in an enclosed porch. The trial court noted that although the porch was enclosed and partially curtained, the porch area was unheated and used as a storage area, not a living area. Additionally, there was not a doorbell adjacent to the exterior porch door; instead, the dwelling's doorbell was located next to the interior door. Furthermore, a "welcome" sign hung, not next to the outer porch door, but next to the interior door. Based on the court's examination of the porch's physical attributes and the uses to which the porch was put, the trial court properly concluded that the defendant had no reasonable expectation of privacy in the porch area.

CHAPTER 4

Criminal Proceedings

Part II—Pretrial Motions and Proceedings (MCR Subchapters 6.000 and 6.100)

4.23 Dwelling Searches

C. Factors Involved in Dwelling Searches

4. Warrantless Entry

Insert the following text at the top of page 355 before Section 4.24:

See also *People v Tierney*, ___ Mich App ___ (2005), where the emergency aid exception justified police officers' warrantless entry into a home after the officers saw through a window in the front door that a motionless person was slumped over the kitchen table and a rifle and ammunition were in close proximity to the person.

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CHAPTER 4

Criminal Proceedings

Part II—Pretrial Motions and Proceedings (MCR Subchapters 6.000 and 6.100)

4.24 Investigatory Stops

B. Traffic Stop

Insert the following text after the June 2005 update to page 356:

Police officers may stop a vehicle if the officers have reasonable suspicion that the vehicle was involved in criminal activity, even if the officers do not possess reasonable suspicion that the driver or owner of the vehicle was engaged in that conduct. *United States v Marxen*, ___ F3d ___, ___ (2005). Because a traffic stop under these circumstances is lawful, any evidence seized as a result of the stop is lawfully obtained, even if the items seized are unrelated to the criminal activity that prompted the traffic stop. *Marxen*, *supra* at ___.

In *Marxen*, the defendant's vehicle was identified as the car used by suspects in an armed robbery. Although the defendant did not match the description of either of the suspects and police had not observed the defendant interact with either of the suspects during their post-robbery surveillance of the defendant, the investigative traffic stop that occurred eleven days after the robbery did not violate the defendant's constitutional rights. During the stop, which was based solely on the fact that the vehicle's description and license plate matched that of the car used in the robbery, police officers noticed a marijuana pipe and a bag of marijuana in plain view in the defendant's car. Because the stop was lawful, the seizure of the unlawful items—seen by officers who were lawfully in a position to see them—was also proper. *Marxen, supra* at ___.

CHAPTER 4

Criminal Proceedings

Part IV—Pleas (MCR Subchapter 6.300)

4.31 Felony Plea Proceedings

E. Standard of Review

Replace the third paragraph on page 387 and the March 2005 update to page 387 with the following text:

In *Halbert v Michigan*, 545 US ___ (2005), the United States Supreme Court concluded that an indigent defendant convicted by plea may not be denied the appointment of appellate counsel to seek a discretionary appeal of his or her conviction. *Halbert* overrules the Michigan Supreme Court's decisions in *People v Harris*, 470 Mich 882 (2004) and *People v Bulger*, 462 Mich 495 (2000), and it nullifies MCL 770.3a, the statutory provision that addresses the appointment of counsel to indigent defendants convicted by plea.

Specifically, the *Halbert* Court noted that an appeal by right or by leave to Michigan's intermediate appellate court (the Court of Appeals) constituted a first-tier review of a defendant's case, the disposition of which, to some degree, entailed an adjudication of its merits. *Halbert, supra* at ___. Due process and equal protection demand that an indigent defendant not be deprived of counsel in advancing what will most likely be the only direct review the defendant's plea-based conviction and sentence will receive. *Halbert, supra* at ___.

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CHAPTER 4
Criminal Proceedings

Part IV—Pleas (MCR Subchapter 6.300)

4.35 Withdrawal of a Guilty Plea

G. Appealing a Guilty Plea

Replace the text on pages 394 and 395 and the March 2005 update to those pages with the following text:

In *Halbert v Michigan*, 545 US ___ (2005), the United States Supreme Court concluded that an indigent defendant convicted by plea may not be denied the appointment of appellate counsel to seek a discretionary appeal of his or her conviction. *Halbert* overrules the Michigan Supreme Court's decisions in *People v Harris*, 470 Mich 882 (2004) and *People v Bulger*, 462 Mich 495 (2000), and it nullifies MCL 770.3a, the statutory provision that addresses the appointment of counsel to indigent defendants convicted by plea.

Specifically, the *Halbert* Court noted that an appeal by right or by leave to Michigan's intermediate appellate court (the Court of Appeals) constituted a first-tier review of a defendant's case, the disposition of which, to some degree, entailed an adjudication of its merits. *Halbert, supra* at ___. Due process and equal protection demand that an indigent defendant not be deprived of counsel in advancing what will most likely be the only direct review the defendant's plea-based conviction and sentence will receive. *Halbert, supra* at ___.

CHAPTER 4

Criminal Proceedings

Part V—Trials (MCR Subchapter 6.400)

4.41 Confrontation

A. Defendant's Right of Confrontation

4. Unavailable Witness

Insert the following text after the first paragraph near the top of page 415:

In *United States v Arnold*, ___ F3d ___ (CA 6, 2005), the Sixth Circuit expounded on the Supreme Court's discussion of testimonial evidence in *Crawford v Washington*, 541 US 36, 50–62 (2004), by examining the dictionary definitions of the terms "testimony" and "testimonial." In *Arnold*, the court noted that "[t]he Oxford English Dictionary ('OED') defines 'testimonial' as 'serving as evidence; conducive to proof;' as 'verbal or documentary evidence;' and as '[s]omething serving as proof or evidence.' . . . The OED defines 'testimony' as '[p]ersonal or documentary evidence or attestation in support of a fact or statement; hence, *any form of evidence or proof*.' (emphasis added)." The Court further noted that Webster's Third New International Dictionary of the English Language "defines 'testimonial' as 'something that serves as evidence: proof.'" The dictionary definitions, coupled with *Crawford's* standard that statements made to government officers– including police—are testimonial in nature and should not be admitted when a defendant has not had the opportunity to cross-examine the declarant, compelled the *Arnold* Court to conclude that the out-of-court statements were improperly admitted against the defendant at trial.

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CHAPTER 4
Criminal Proceedings

Part V—Trials (MCR Subchapter 6.400)

4.48 Jury Instructions

C. Instructions on Lesser Included Offenses

1. Necessarily Included Lesser Offenses

Insert the following text after the May 2005 update to page 433:

Assault with intent to do great bodily harm less than murder is a lesser included offense of assault with intent to commit murder; therefore, the trial court properly instructed the jury on both offenses. *People v Brown*, ___ Mich App ___, ___ (2005). In *Brown*, the defendant fired a gun toward several individuals, three of whom were injured, and one of whom suffered serious and permanent injuries. The defendant asserted that assault with intent to do great bodily harm less than murder was a cognate lesser offense of assault with intent to commit murder and objected to the trial court's decision to instruct the jury on the lesser charge. A majority of the *Brown* panel concluded that the specific intent necessary for the offense of assault with intent to do great bodily harm less than murder was "completely subsumed" by the specific intent necessary for the offense of assault with intent to commit murder.

CHAPTER 4

Criminal Proceedings

Part VI—Sentencing and Post-Sentencing (MCR Subchapters 6.400 and 6.500)

4.54 Sentencing—Felony

B. Sentencing Guidelines

Insert the following text after the partial paragraph at the top of page 450:

A trial court may properly consider an individual's postprobation conduct when imposing a sentence of imprisonment following revocation of the individual's probation. *People v Hendrick*, ___ Mich ___, ___ (2005). A court may look to an individual's postprobation conduct to determine whether substantial and compelling reasons warrant a departure from the minimum sentence range recommended under the legislative guidelines. *Hendrick, supra* at ___.

An individual's probation violation alone—without regard to the specific conduct underlying the violation—may constitute a substantial and compelling reason to depart from the sentencing guidelines. *People v Schaafsma*, ___ Mich App ___, ___ (2005). According to the *Schaafsma* Court:

> "[A]ny probation violation represents an affront to the court and an indication of an offender's callous attitude toward correction and toward the trust the court has granted the probationer. The violation itself is objective and verifiable, so we see no reason why a court must focus exclusively on the underlying conduct, especially since the conduct itself may be punished in a separate proceeding. We conclude that the offender's probation violation itself is an objective and verifiable factor worthy of independent consideration. Since the probation violation is objective and verifiable, in its discretion the trial court may conclude that the factor provides a substantial and compelling reason to depart from the sentencing guidelines." *Schaafsma, supra* at ___.

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CHAPTER 4

Criminal Proceedings

Part VI—Sentencing and Post-Sentencing (MCR Subchapters 6.400 and 6.500)

4.54 Sentencing—Felony

F. Appeal Rights

Delete the first three paragraphs of this subsection and the March 2005 update to page 455 and insert the following text:

In *Halbert v Michigan*, 545 US ___ (2005), the United States Supreme Court concluded that an indigent defendant convicted by plea may not be denied the appointment of appellate counsel to seek a discretionary appeal of his or her conviction. *Halbert* overrules the Michigan Supreme Court's decisions in *People v Harris*, 470 Mich 882 (2004) and *People v Bulger*, 462 Mich 495 (2000), and it nullifies MCL 770.3a, the statutory provision that addresses the appointment of counsel to indigent defendants convicted by plea.

Specifically, the *Halbert* Court noted that an appeal by right or by leave to Michigan's intermediate appellate court (the Court of Appeals) constituted a first-tier review of a defendant's case, the disposition of which, to some degree, entailed an adjudication of its merits. *Halbert, supra* at ___. Due process and equal protection demand that an indigent defendant not be deprived of counsel in advancing what will most likely be the only direct review the defendant's plea-based conviction and sentence will receive. *Halbert, supra* at ___.

CHAPTER 4

Criminal Proceedings

Part VI—Sentencing and Post-Sentencing (MCR Subchapters 6.400 and 6.500)

4.60 Probation Violation

E. Sentencing

Replace the second paragraph on page 469 with the following text:

Whether a defendant's sentence of imprisonment is imposed immediately after conviction or after the imposition and revocation of probation, the legislative sentencing guidelines apply to that sentence when the sentencing offense was committed on or after January 1, 1999. *People v Hendrick*, ___ Mich ___, ___ (2005). In addition, MCL 771.4 permits, but does not require, a sentencing court to impose on the probationer the same penalty that could have been imposed instead of probation. Therefore, subject to any other applicable limits to a court's sentencing discretion, "it is perfectly acceptable to consider postprobation factors in determining whether substantial and compelling reasons exist to warrant an upward departure from the legislative guidelines." *Hendrick, supra* at ___.

An individual's probation violation alone—without regard to the specific conduct underlying the violation—may constitute a substantial and compelling reason to depart from the sentencing guidelines. *People v Schaafsma*, ___ Mich App ___, ___ (2005). According to the *Schaafsma* Court:

> "[A]ny probation violation represents an affront to the court and an indication of an offender's callous attitude toward correction and toward the trust the court has granted the probationer. The violation itself is objective and verifiable, so we see no reason why a court must focus exclusively on the underlying conduct, especially since the conduct itself may be punished in a separate proceeding. We conclude that the offender's probation violation itself is an objective and verifiable factor worthy of independent consideration. Since the probation violation is objective and verifiable, in its discretion the trial court may conclude that the factor provides a substantial and compelling reason to depart from the sentencing guidelines." *Schaafsma, supra* at ___.

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CHAPTER 5

Appeals & Opinions

Part I—Rules Governing Appeals to Circuit Court (MCR Subchapter 7.100)

5.4 Parole Board

D. Appeal From Parole Revocation

Insert the following text before subsection (E) on page 490:

That an individual who has been denied parole cannot appeal the decision in state court is not a violation of the individual's due process rights. *Jackson v Jamrog*, ___ F3d ___, ___ (CA 6, 2005). Where MCL 791.234(9) once authorized prisoners to appeal a parole board decision, the statute now provides prosecutors and crime victims with statutory authority to appeal a parole board's granting of parole. According to the Sixth Circuit, denying prisoners judicial review of parole board decisions is constitutionally sound. The Court explained:

> "Employing the deferential rational-basis review standard in judging the statute, the district court concluded that the state's legitimate explanation—the attempt to minimize the number of frivolous prisoner appeals—rationally accounted for the differing treatment of prisoners on the one hand and prosecutors and crime victims on the other." *Jackson, supra* at ___.

July 2005

Update: Sexual Assault Benchbook

CHAPTER 3

Other Related Offenses

3.7 Child Sexually Abusive Activity

E. Pertinent Case Law

4. Definition of Terms

Insert the following text before the January 2004 update to page 137:

In *People v Tombs*, 472 Mich 446, 448 (2005), the Supreme Court upheld the Court of Appeals' finding in *People v Tombs*, 260 Mich App 201 (2003), that MCL 750.145c requires an intent to disseminate child sexually abusive materials to others. In upholding the Court of Appeals decision, the Court reviewed United States Supreme Court precedent addressing the issue of whether a criminal intent element should be read into a statute where it does not appear. See *Morissette v United States*, 342 US 246 (1952), *Staples v United States,* 511 US 600 (1994), and *United States v X-Citement Video, Inc,* 513 US 64 (1994). In applying the foregoing precedent to this case the Court held:

> "No *mens rea* with respect to distribution or promotion is explicitly required in MCL 750.145c(3). Absent some clear indication that the Legislature intended to dispense with the requirement, we presume that silence suggests the Legislature's intent not to eliminate *mens rea* in MCL 750.145c(3)." *Tombs, supra,* 472 Mich at 456-57.

The Court clarified the elements of distribution or promotion of child sexually abusive material under MCL 750.145c(3) as follows:

> "(1) the defendant distributed or promoted child sexually abusive material, (2) the defendant knew the material to be child sexually abusive material at the time of distribution or promotion, and (3)

the defendant distributed or promoted the material with criminal intent." *Tombs, supra,* 472 Mich at 465.

The Court also held "that the mere obtaining and possessing of child sexually abusive material using the Internet does not constitute a violation of MCL 750.145c(3)." *Tombs, supra,* 472 Mich at 465.

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CHAPTER 3
Other Related Offenses

3.16 Indecent Exposure

D. Pertinent Case Law

Insert the following new sub-subsection on page 162 after the June 2005 update to section 3.16(D):

7. Public Exposure Not Necessary

In *People v Neal,* ___ Mich App ___, ___ (2005), the defendant exposed his erect penis to a minor female guest inside a bedroom in his home. After the jury returned a verdict of guilty, the defendant moved for a directed verdict, arguing that in order to be convicted of indecent exposure pursuant to MCL 750.335a, the exposure must take place in a public place. The trial court granted the defendant's motion for directed verdict and dismissed the charge. On appeal, the Court of Appeals overturned the trial court's finding and reinstated the defendant's conviction. MCL 750.335a prohibits "open" *or* "indecent" exposures that are knowingly made. MCL 750.335a does not require that "indecent" exposures only occur in a public place. Further, the Court found that case law does not require public exposure. The Court concluded that a trial court should not focus on the location of an indecent exposure but upon "the act of intentionally exposing oneself to others who would be expected to be shocked by the display." The Court concluded:

> "Here, defendant's exposure clearly falls within the definition of an 'open' exposure, whereas the victim would have reasonably been expected to observe it and, she might reasonably have been expected to have been offended by what was seen. . . . Additionally, defendant's conduct also falls under the definition of 'indecent' exposure. Defendant . . . made a knowing and intentional exposure of part of his body (his genitals) to a minor child in a place (a house) where such exposure is likely to be an offense against generally accepted standards of decency in a community. . . . It was not necessary that the exposure occur in a public place because there was in fact a witness to the exposure itself.[4] Thus, defendant's exposure could be properly categorized not only as an 'open' exposure, but also as an 'indecent' exposure for purposes of MCL 750.335a.

"[4] In light of our conclusion, the Standing Committee on Standard Criminal Jury Instructions may want to review CJI2d 20.33(4)." *Neal, supra* at ___.

CHAPTER 4

Defenses to Sexual Assault Crimes

4.10 Insanity, Guilty But Mentally Ill, Involuntary Intoxication, and Diminished Capacity

D. Diminished Capacity

Insert the following text on page 234 after the quote near the middle of the page:

In *People v Tierney*, ___ Mich App ___, ___ (2005), the defendant argued that the trial court erred in prohibiting him from introducing expert testimony regarding his mental state to negate his intent. The trial court excluded the expert testimony based on the holding in *People v Carpenter*, 464 Mich 223 (2001), which removed diminished capacity as a viable defense. On appeal, the defendant argued that the Court's ruling in *Carpenter* was dicta and was therefore not binding. The Court of Appeals rejected that argument and in upholding the trial court's ruling stated:

> "In our view, the *Carpenter* ruling was not dicta. Not only was it essential to the determination of the case, it was the very basis of the Court's resolution of the case. So long as case law established by our Supreme Court remains valid, this Court and all lower courts are bound by that authority." [Citation omitted.] *Tierney*, *supra* at ___.

The Court of Appeals also rejected defendant's argument that the trial court's ruling prevented him from presenting a defense. Defendant was allowed to present non-expert testimony regarding intent.

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CHAPTER 7
General Evidence

7.6 Former Testimony of Unavailable Witness

Insert the following text after the April 2004 update to page 364:

In *United States v Arnold*, ___ F3d ___ (CA 6, 2005), the Sixth Circuit expounded on the Supreme Court's discussion of testimonial evidence in *Crawford v Washington*, 541 US 36, 51-53, 68 (2004), by examining the dictionary definitions of the terms "testimony" and "testimonial." In *Arnold*, the court noted that "[t]he Oxford English Dictionary ('OED') defines 'testimonial' as 'serving as evidence; conducive to proof;' as 'verbal or documentary evidence;' and as '[s]omething serving as proof or evidence.' . . . The OED defines 'testimony' as '[p]ersonal or documentary evidence or attestation in support of a fact or statement; hence, *any form of evidence or proof*.' . . . (emphasis added)." The Court further noted that Webster's Third New International Dictionary of the English Language "defines 'testimonial' as 'something that serves as evidence: proof.'" In *Crawford*, the Court stated that an "accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not." In *Arnold,* the victim "made the statements to government officials: the police. This fact alone indicates that the statements were testimonial . . . ." *Arnold, supra* at ___. In addition, the *Arnold* Court found that because the victim was the only witness to the incident, she could reasonably expect that her statements would be used to prosecute the defendant and to "establish or prove a fact." The Court concluded that this finding was supported by the holding in *United States v Cromer,* 389 F3d 662 (CA 6, 2004) that a "statement made knowingly to the authorities that describes criminal activity is almost always testimonial."